

**STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION**

IN THE MATTER OF THE REQUEST)	
FOR REVIEW BY:)	CHARGE NO.: 2009SA1665
JOANNA TOTH)	EEOC NO.: 21BA90572
)	ALS NO.: 10-0125
)	
Petitioner.)	

ORDER

This matter coming before the Commission by a panel of three, Commissioners Sakhawat Hussain, M.D., Spencer Leak, Sr., and Diane M. Viverito presiding, upon Joanna Toth's ("Petitioner") Request for Review ("Request") of the Notice of Dismissal issued by the Department of Human Rights ("Respondent")^[1] of Charge No. 2009SA1665; and the Commission having reviewed all pleadings filed in accordance with 56 Ill. Admin. Code, Ch. XI, Subpt. D, § 5300.400, and the Commission being fully advised upon the premises;

NOW, **THEREFORE**, it is hereby **ORDERED** that the Respondent's dismissal of the Petitioner's charge is **SUSTAINED** on the following ground:

LACK OF SUBSTANTIAL EVIDENCE

In support of which determination the Commission states the following:

1. The Petitioner filed a charge of discrimination with the Respondent on November 10, 2008. The Petitioner alleged that Wachovia Securities, LLC ("Employer") issued her an initial disciplinary warning on July 17, 2008, because of her sex, female (Count A), and her age, 44 (Count D); that it issued her a written disciplinary warning on August 22, 2008, because of her sex (Count B) and age (Count E); that it issued her an improvement period disciplinary warning on September 24, 2008, because of her sex (Count C) and age (Count F); and finally that it discharged her on September 26, 2008, because of her sex (Count G) and age (Count H), in violation of Section 2-102(A) of the Illinois Human Rights Act ("Act").
2. On February 10, 2010, the Respondent dismissed the Petitioner's charge for Lack of Substantial Evidence. On February 14, 2010, the Petitioner filed this timely Request.
3. The Employer, a financial brokerage firm, hired the Petitioner on May 5, 2008 as a Client Associate ("CA").

^[1] In a Request for Review Proceeding, the Illinois Department of Human Rights is the "Respondent." The party to the underlying charge who is requesting review of the Department's action shall be referred to as the "Petitioner."

4. The Employer's offer letter to the Petitioner stated that as a condition of her continued employment, the Petitioner was required to study for and obtain Series 7 and 63 licenses within 90 days of her hire date. The offer letter informed the Petitioner that if she failed to obtain the requisite licensing within 90 days, the Petitioner would be considered to have resigned her position as of that date. The Petitioner signed the letter on May 5, 2008.
5. The Employer stated that registered investment advisors were required by Illinois law to pass the Series 63 and 65 exams. However, the Employer stated the practice in Illinois was that passing a Series 66 exam qualified as passing both the Series 63 and Series 65 exams.
6. At the time the Petitioner was hired, the Employer had in place a Corrective Action Policy ("Policy"). The Policy set forth a progressive disciplinary process which generally included up to five steps: **(i)** initial warning; **(ii)** written warning and counseling; **(iii)** improvement/probation period; **(iv)** suspension, and **(v)** dismissal.
7. The Employer disciplined the Petitioner for what it stated were various performance deficiencies.
8. First, on July 17, 2008, the Employer issued the Petitioner an initial warning for making errors in client paper work and communication.
9. Next, on August 22, 2008, the Employer issued the Petitioner a written warning for errors in paperwork and processing of paperwork. At that time, the Employer warned the Petitioner that if her performance did not improve over the next 30 days, she could be subject to further corrective action.
10. Finally, on September 24, 2008, the Petitioner was placed on an improvement period disciplinary warning.
11. On September 25, 2008 the Petitioner failed the Series 66 exam.
12. The Petitioner stated the Employer refused her request to retake the Series 66 exam.
13. On September 26, 2008, the Employer discharged the Petitioner.
14. In her charge, the Petitioner alleged the Employer disciplined her on July 17, 2008, August 22, 2008, and September 24, 2008 because of her sex and her age. The Petitioner further alleged the Employer discharged her on September 26, 2008, because of her sex and her age. The Petitioner alleged that similarly situated younger and male employees whose performance was similar to hers were not disciplined by the Employer. Further, the Petitioner alleged that

younger, male employees who failed the Series 66 exam were not discharged by the Employer.

15. In her Request, the Petitioner argues the Respondent's investigator appeared biased in favor of the Employer. The Petitioner contends younger and male employees who failed the Series 7 exam were permitted by the Employer to retake the test, while the Petitioner was not allowed to retake the Series 66 exam.
16. In its Response, the Respondent requests that the Commission sustain the dismissal of the Petitioner's charge for lack of substantial evidence. The Respondent argues that the Employer articulated non-discriminatory reasons both for disciplining the Petitioner and for discharging her. The Respondent found no substantial evidence of pretext.

Conclusion

The Commission concludes the Respondent properly dismissed the Petitioner's charge for lack of substantial evidence. If no substantial evidence of discrimination exists after the Respondent's investigation of a charge, the charge must be dismissed. See 775 ILCS 5/7A-102(D). Substantial evidence exists when the evidence is such that a reasonable mind would find the evidence sufficient to support a conclusion. See In re Request for Review of John L. Schroeder, IHRC, Charge No. 1993CA2747, 1995 WL 793258, *2 (March 7, 1995).

First Counts A through F were properly dismissed for lack of substantial evidence because the evidence is insufficient to establish even a *prima facie* case of discrimination. See Marinelli v. Human Rights Commission, 262 Ill.App.3d 247, 634 N.E.2d 463 (2nd Dist. 1994). In particular, there was no evidence the Employer had treated similarly situated employee outside the Petitioner's protected classes more favorably under similar circumstances. The Petitioner contends in her Request that the Employer allowed younger, male employees to retake their Series 7 exam. However, the Petitioner was fired for her failure to pass a Series 66 exam, not the Series 7 exam. There is no evidence that failing a Series 7 exam is comparable to failing a Series 66 exam.

Assuming *arguendo* the evidence was sufficient to establish *prima facie* cases as to Counts A through F, the Employer articulated a non-discriminatory reason for disciplining the Petitioner, which was that the Petitioner had failed to competently and reliably perform her duties. There was no substantial evidence of pretext presented. The Employer documented the Petitioner's inability to meet its performance expectations. Furthermore, there was no evidence the Employer bore harbored animus toward either female employees or employees over the age of 40. In fact, the Petitioner was one of 11 female full-time CAs working for the Employer at the time. Of those 11 female CAs, 5 were older than the Petitioner.

Similarly, Count G and Count H were properly dismissed for lack of substantial evidence. The Petitioner's *prima facie* case fails because there is no evidence that similarly situated younger, male employees who failed to pass a Series 66 exam more than 90 days after their hire date were nonetheless retained by the Employer.

Accordingly, it is the Commission's decision that the Petitioner has not presented any evidence to show the Respondent's dismissal of her charge was not in accordance with the Act. The Petitioner's Request is not persuasive.

WHEREFORE, IT IS HEREBY ORDERED THAT:

The dismissal of the Petitioner's charge is hereby **SUSTAINED**.

This is a final Order. A final Order may be appealed to the Appellate Court by filing a petition for review, naming the Illinois Human Rights Commission, the Illinois Department of Human Rights, and Wachovia Securities, LLC, as Respondents, with the Clerk of the Appellate Court within 35 days after the date of service of this Order.

STATE OF ILLINOIS

HUMAN RIGHTS COMMISSION

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Entered this 22nd day of September 2010

Commissioner Sakhawat Hussain, M.D.

Commissioner Spencer Leak, Sr.

Commissioner Diane M. Viverito